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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON K. TODD,

Defendant and Appellant.

E069739

(Super.Ct.No. FVI1600085)

OPINION

APPEAL from the Superior Court of San Bernardino County. Charles J. Umeda, Judge. Affirmed with directions as modified.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski, Kristen Kinnaird Chenelia, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Following a heated argument, defendant and appellant Brandon K. Todd shot the victim multiple times, resulting in his death. In a bifurcated proceeding, defendant pled no contest to felon in possession of a firearm (Pen. Code,¹ § 29800, subd. (a)(1); count 3). Following a jury trial, defendant was convicted of voluntary manslaughter (§ 192, subd. (a)), the lesser included offense of murder (§ 187, subd. (a)) as alleged in count 1. The jury also found true that in the commission of the voluntary manslaughter, defendant personally used a firearm (§ 12022.5).² Defendant was sentenced to a total term of 21 years eight months in state prison with 703 days of credit for time served consisting of the upper term of 11 years on count 1, plus 10 years for the firearm use enhancement, and a consecutive eight months on count 3.

On appeal, defendant argues (1) the matter must be remanded for resentencing pursuant to newly enacted Senate Bill No. 620 to permit the trial court to exercise its discretion to strike the firearm enhancement; (2) the judgment must be modified to reflect 772 days of presentence custody credits; and (3) the abstract of judgment must be corrected to conform to the oral pronouncement of judgment. The People agree that defendant's conduct credits and the clerical errors in the abstract of judgment should be corrected, but believe a remand is not necessary because the trial court's statements at

¹ All future statutory references are to the Penal Code unless otherwise stated.

² Count 2, assault with a firearm (§ 245, subd. (a)(2)), was dismissed pursuant to section 1385.

sentencing and its decision to impose the aggravated term on the firearm enhancement unequivocally show that the court would not have stricken the enhancement even if given the opportunity to do so. We modify defendant's presentence custody credits and direct the trial court to prepare an amended abstract of judgment which correctly reflects the trial court's oral pronouncement of the judgment and defendant's presentence custody credits. We find remand for resentencing is unnecessary and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

Touni Maida had worked at his family-owned market in the city of Helendale on Blue Water Road every other day for 13 years. There was a bar attached to the building. Maida knew Ronnie Senegal and defendant as customers of the store for several years and saw them practically every day he was at work. Maida spoke to defendant about his job, and defendant would purchase items and hang out and talk with Maida and other customers. Defendant would arrive at around the same times as Senegal. Maida saw defendant and Senegal acting friendly towards each other at the market before, and he never observed any animosity between the two before January 12, 2016.

At around 8:00 or 9:00 a.m., on January 12, 2016, Maida saw defendant getting his coffee and standing outside smoking cigarettes. Senegal then walked through the parking lot towards the side of the store and punched defendant in the face. Defendant backed away from Senegal and asked Senegal what defendant had done to provoke the

attack. Senegal stated that defendant was not answering his lawyer's phone calls regarding defendant giving a statement in a civil lawsuit Senegal was involved in. When Senegal hit defendant in the face with his fist approximately four or five times, Maida tried to get in between them to break it up.

Defendant never hit Senegal back, and instead walked away relatively calmly. Maida believed that Senegal and defendant had been talking in the bar before the incident started. Defendant left the premises in his car, but after five or 10 minutes, he pulled back in to the parking lot with his window open and said, "I'm not here for a problem. I'm here for smokes." Senegal replied, "If you got that clapper you better use it," and defendant said, "I'm not here for no drama."

Maida did not know why Senegal would think defendant had a gun, and Maida did not see defendant with a gun. Maida thought that defendant and Senegal were acting civil, and they said they were going to talk it out. Senegal was not hostile at this point but seemed to be "covering his ass" for hitting defendant. After defendant said that they did not need to talk anymore, Senegal said, "If you want to take it to the streets you can take it to the streets." Defendant wanted Senegal to leave him alone, and Senegal called defendant a "bitch" and said that "in California it's different than Texas." Defendant told Senegal to stop "[] with him" and to quit coming after him.

When Senegal punched defendant in the face again, defendant told Senegal to leave him alone, but Senegal continued to advance toward defendant and hit defendant one more time. Defendant thereafter fired approximately seven shots in succession at

Senegal and fled the scene in his vehicle. Surveillance video from the bar was played for the jury showing the incident.

On the date of the shooting, Maida observed that defendant at no time attacked Senegal and was never verbally aggressive. Defendant also did not look like someone who was about to get violent and was trying to figure out what was going on. Senegal told defendant that he would “run him out” of the community and that he should take his “tough guy stuff back to Texas.” Maida also noticed that Senegal hit defendant so hard that defendant staggered backwards, and that defendant looked afraid and told Senegal to stop. Defendant was going backwards towards his car as Senegal continued to advance towards defendant. Senegal threw off his watch indicating he was ready to fight, and Maida attempted to stop him by grabbing the back of his sweatshirt. Senegal continued to charge at defendant when the shots were fired.

Maida testified that Senegal was known to people, including defendant, as a violent, angry, and intimidating person. Senegal was involved in multiple incidents at Maida’s store before, including punching a mentally disabled man so hard that part of his scalp was left on the store wall. Another incident occurred when a female employee denied Senegal use of the store phone, and Senegal yelled and threatened to hurt her. Senegal also brought a gun to potentially use on a man named Calvin, but did not get physical with Calvin. Maida noted that no one had as many altercations at his store as Senegal.

Another employee at the market witnessed the shooting and testified that defendant was a very nice, peaceful, calm, and collected person, whereas Senegal was a violent person who was always in fight mode and was in fight mode on January 12, 2016. During the incident, the employee recalled that defendant's demeanor was calm and collected, and that defendant was only asking Senegal what the problem was.

San Bernardino County Sheriff's Deputy Michael Otey arrived at the scene and observed gunshot wounds to Senegal's abdomen. Senegal told Deputy Otey that "Brandon" shot him. Later, at about 11:19 a.m., Deputy Otey went to defendant's residence. Following announcements for the residents to exit the house, defendant and another male exited the residence. Deputy Otey observed that defendant had a swollen, bruised right eye.

Eight fired cartridge casings were found at the crime scene. Photographs of defendant showed bruising on his face, and a photograph of Maida's pants depicting a bullet hole in the left leg were shown to the jury. A deputy testified that if eight fired cartridge casings that were found at the scene were shot in quick succession, it would signify the shooter used a semiautomatic firearm. Defendant's house was searched but no firearm was found.

Senegal's autopsy revealed evidence of five gunshot wounds and abrasions on his shins and arms. Two of the gunshots had passed through the body cavities, and there were injuries to his right kidney, liver, and right lung, and bleeding in the right chest space. The medical examiner concluded that Senegal's cause of death was gunshot

wounds of torso and arms and that it appeared the shots were fired within a few inches of Senegal's body.

B. *Procedural Background*

On June 21, 2017, defendant pled no contest to felon in possession of a firearm (§ 29800, subd. (a)(1)) and waived time for purposes of sentencing.

On July 10, 2017, following presentation of evidence, count 2, assault with a firearm (§ 245, subd. (a)(2)) was dismissed pursuant to section 1385.

On July 12, 2017, a jury found defendant guilty of voluntary manslaughter (§ 192, subd. (a)), the lesser included offense of murder (§ 187, subd. (a)) as alleged in count 1. The jury also found true that in the commission of the voluntary manslaughter, defendant personally used a firearm (§ 12022.5).

On September 18, 2017, defendant filed a statement in mitigation asking the trial court to exercise its discretion and impose a three-year term for the section 12022.5 firearm enhancement. The People filed their sentencing brief on September 26, 2017. The People recognized the sentencing triad for the firearm enhancement to be three, four, or 10 years, and asked the trial court to impose the aggravated term of 10 years for the enhancement. The probation officer also recommended that a 10-year term be imposed for the firearm enhancement.

Defendant's sentencing hearing was held on November 13, 2017. At that time, the trial court stated it had reviewed the parties' briefs, probation report, and letters written by friends and relatives. The court also heard victim impact statements from the victim's

wife, as well as, argument from counsel. The People asked the court to impose the maximum possible sentence of 21 years eight months. Defense counsel acknowledged that defendant had prior convictions in two drug cases, and a possession of a firearm case, but argued that defendant was not a violent person. Defense counsel asked the court to impose the mitigated term of three years for the voluntary manslaughter, three years for the firearm enhancement, and to stay the felon in possession of a firearm count.

The trial court sentenced defendant to a total term of 21 years eight months in state prison. The court also dismissed the firearm enhancement pursuant to section 12022.53, subdivision (d), because that firearm enhancement “cannot be an enhancement based on the charge found by the jury.” The court awarded defendant 672 actual days plus 101 conduct days, for a total of 703 days’ credit for time served.

In sentencing defendant, the trial court stated: “[Defendant], you know, this was tragic. You heard Ms. Senegal and you heard her statement of her loss because of your actions that day. It’s tragic for her and her family but it’s also tragic for you. I reviewed your history. You certainly were involved in criminal conduct while you were in Texas. It appears as if you were attempting to change your life. But it also appears that despite the fact that you knew in Texas that you weren’t to possess a firearm, that you proceeded to continue to possess a firearm here in California. [¶] That decision is what allowed you, that facilitated you to kill Mr. Senegal. That’s a horrendous decision that you made, and the decision, because without a firearm, this probably would have just ended as hurt feelings, but because you continued to possess that firearm and you had access to it, that

allowed you to come back and take a life. The only thing the Court can say is that this is a tragic situation, not only for the Senegal family but for you and your family. [¶] And unfortunately, after reviewing the issues and factors in aggravation and mitigation, I can't ignore what occurred in Texas, the fact that you continued to break the law by possessing a firearm here in California. It's the Court's intent to follow the probation recommendation after weighing of factors in aggravation and mitigation." The prosecutor asked the trial court, "In sentencing the defendant to 10 years for the firearm allegation, is the Court exercising its discretion in sentencing him to the aggravated term of 10 years?" The court replied, "That's correct. The aggravated term of 10 years."

III

DISCUSSION

A. *Motion to Strike Firearm Enhancement*

Defendant contends the matter must be remanded for resentencing pursuant to Senate Bill No. 620 to allow the trial court the opportunity to exercise its discretion to strike the section 12022.5 firearm enhancement or impose a lesser term on remand. The People argue that remand for resentencing is not required because the trial court's statements strongly suggest it would not strike the enhancement even if it had known it had the discretion to do so. The record supports the People's position.

At the time of sentencing on November 13, 2017, imposition of an enhancement under section 12022.5 was mandatory, and the trial court had no authority to strike firearm enhancements in the interest of justice pursuant to section 1385 or under any

other provision of law. (§§ 12022.5, subd. (c); see, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363.) On October 11, 2017, the Governor signed Senate Bill No. 620, effective January 1, 2018. (2017-2018 Reg. Sess.; Stats. 2017, ch. 682, § 1.) As of January 1, 2018, section 12022.5, subdivision (c), gives the trial court the discretion to strike the firearm enhancements in the interest of justice pursuant to section 1385. As both parties acknowledge, the grant of discretion to strike firearm enhancements in the amended statute applies retroactively to all nonfinal convictions. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712 (*Chavez*); *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.)

In general, when new statutory discretion is applied retroactively or the trial court was otherwise unaware of its discretion, a defendant is entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) “Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. [Citation.]” (*Ibid.*)

The general rule is not without exception. A trial court must exercise “informed discretion” when sentencing a defendant. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) If the court proceeds on the assumption that it lacks discretion, remand for resentencing is required *unless* the record “clearly indicate[s]” that the court would have

reached the same conclusion had it been aware of its discretionary powers. (*Ibid.*)

Considering a retroactive amendment to the Three Strikes law, the California Supreme Court held that remand for resentencing may be “denied if the record shows that the sentencing court . . . clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. [Citation.]” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13.) Thus, where the trial court’s comments or actions clearly indicate that remand would be an “‘idle act,’” remand may be denied. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901; see *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) This exception applies equally to the amendment to section 12022.5, but only if “the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.]” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*); *Chavez, supra*, 22 Cal.App.5th at p. 713.)

We agree with the People that the comments and actions of the trial court in sentencing defendant falls within the exception to the general rule requiring remand. In sentencing defendant, the trial court gave particular weight to the fact that defendant had prior convictions in Texas, and nonetheless, was illegally possessing a gun in California. The trial court noted it was defendant’s decision to possess the firearm that led to the tragic killing and chose to follow the probation report’s recommendation to impose the maximum term after weighing the mitigating and aggravating factors. The trial court was aware of its discretion to select a term from the triad for both the voluntary manslaughter

conviction and the section 12022.5 gun enhancement. The court chose the aggravated term of 11 years for the voluntary manslaughter conviction and the aggravated term of 10 years for the firearm enhancement. The trial court also imposed a consecutive eight-month term for the firearm possession conviction, so that defendant would serve the maximum term possible.

Defendant argues that had the trial court known it had discretion to strike the firearm enhancement, “the trial court may simply decide to impose a lesser term on remand, rather than strike the enhancement due to the fact that the range of punishment is now much broader.” However, the trial court’s statements do not support this position. The court’s comments and actions show that the court wanted to impose the maximum term and punish defendant for possessing the firearm. The court would not have exercised its discretion to strike the firearm enhancement or impose a lesser term even if it had known it had the discretion to do so.

Defendant’s reliance on *McDaniels*, *supra*, 22 Cal.App.5th 420 to support his position is inapposite because that case did not involve a clear indication of intent akin to the instant case. *McDaniels* held that remand in light of Senate Bill No. 620 was proper when, among other things, the trial court “expressed no intent to impose the maximum sentence” and struck other discretionary enhancements. (*McDaniels*, at p. 428.) This case is also not comparable to *People v. Billingsley* (2018) 22 Cal.App.5th 1076 (*Billingsley*), where the appellate court remanded for resentencing despite the trial court’s refusal to run the enhanced sentence concurrently and the following comments: “[T]his

is not the kind of case I would stay the gun allegation. I have no say as to the actual penalty for that particular allegation. It's set at 20 years, but as far as staying or striking the allegation, the court does not have authority to do so, nor would it do so under the circumstances of this case.'" (*Id.* at p. 1080.)

In *Billingsley, supra*, 22 Cal.App.5th 1076, the appellate court noted that the trial court thought the case "'could have been a lot worse,' . . . did not express an intention to impose the maximum possible sentence [and] also expressed concern the consequences for Billingsley's sentence were 'unfortunate' and 'tragic.' [Citation.]" (*Billingsley*, at p. 1081.) Here, in contrast, the court imposed the maximum sentence on the voluntary manslaughter and felon in possession of a firearm offenses, as well as the maximum enhancement, and stated its reasons. Although the court expressed sympathy for defendant, the court's comments and maximum terms make it clear that the court would not have exercised its discretion to strike the firearm allegations, and therefore a remand would be an idle act.

Defendant also cites to *People v. Francis* (1969) 71 Cal.2d 66. *Francis* addressed whether an amendment to the Penal Code providing for alternative sentences for narcotics offenses applied retroactively to cases in which judgment was not yet final. (*Francis*, at p. 75.) Although the Supreme Court remanded for resentencing, it did not discuss the possibility that remand might be futile, nor does it appear the People raised such an argument. (*Id.* at p. 79.) Thus, *Francis* does not support the proposition that

remand is mandated whenever a change in the law has retroactive application, and it is not in conflict with our holding.

“In light of the trial court’s express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether. We therefore conclude that remand in these circumstances would serve no purpose but to squander scarce judicial resources. [Citations.]” (*People v. McVey* (2018) 24 Cal.App.5th 405, 419 [appellate court held record affirmatively demonstrated that trial court would not exercise its new discretion to strike section 12022.5 firearm enhancement under newly enacted statute, and thus remand was not warranted for reconsideration of firearm enhancement].)

B. *Modification of Custody Credits*

Defendant contends the judgment must be modified to reflect 772 days of presentence custody credits consisting of 672 days of actual credits and 100 days of conduct credits. The People agree that defendant should be given additional conduct credits.

Defendant was in custody from January 12, 2016, until he was sentenced on November 13, 2017. A defendant is entitled to credit for all days in presentence custody including the day of arrest and the day of sentencing. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469.)

Accordingly, as defendant concedes, the trial court correctly awarded defendant 672 actual days of custody credits.

Regarding presentence conduct credits, because defendant was convicted of violent felonies as defined in section 667.5, subdivision (c), the trial court limited defendant's presentence conduct credit to 15 percent under section 2933.1.

Fifteen percent of 672 is 100.8 days. Here, the trial court rounded this number up to 101. However, due to an error, the trial court stated the total number of presentence custody credits was 703.

Defendant also correctly notes that the trial court erred in rounding up the presentence conduct credit. In making the 15 percent calculation under section 2933.1, the correct procedure is to round down to the nearest whole number and not round up. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.) Defendant was thus entitled to an additional 100 days of conduct credits.

Accordingly, the abstract of judgment and the court's minute order of the November 13, 2017 sentencing hearing must be corrected to reflect 672 actual days of presentence custody credits and 100 days of conduct credits, for a total of 772 days of presentence credit. "[I]f the minutes or abstract of judgment fails to reflect the judgment pronounced by the court, the error is clerical and the record can be corrected at any time to make it reflect the true facts." (*People v. Little* (1993) 19 Cal.App.4th 449, 452 (*Little*); see *People v. Mitchell* (2001) 26 Cal.4th 181, 188 (*Mitchell*) ["evident discrepancy between the abstract of judgment and the judgment that the reporter's

transcript and the trial court's minute order reflect, the appellate court itself should order the trial court to correct the abstract of judgment"].) The Court of Appeal may order the clerk of the superior court to correct the abstract to match the judgment and send the corrected abstract to the appropriate agencies. (See *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084-1085.)

C. *Correction of Abstract of Judgment*

Defendant also requests, and the People agree, correction of two clerical errors in the abstract of judgment. As both parties note, it is well settled that where the abstract of judgment does not reflect the actual sentence imposed by the trial court, the reviewing court may correct clerical errors contained in the abstract of judgment. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *Mitchell, supra*, 26 Cal.4th at p. 188; *Little, supra*, 19 Cal.App.4th at p. 452.)

Here, the abstract of judgment incorrectly states that defendant was convicted of a section 12022.53 firearm enhancement. Defendant was actually convicted of a section 12022.5 firearm enhancement, and at the time of sentencing, the trial court dismissed the section 12022.53 enhancement. In addition, the abstract of judgment incorrectly states that defendant had been convicted of "POSS/MANU/SELL DNGRS WPN." Defendant pled no contest to possession of a firearm by a felon, and the People never alleged that defendant had manufactured or sold a dangerous weapon.

Accordingly, we grant defendant's request to correct the abstract of judgment. (See *Mitchell, supra*, 26 Cal.4th at p. 185.)

IV

DISPOSITION

The judgment is modified to reflect a total of 772 days of presentence credit, consisting of 672 actual days and 100 conduct credits. The clerk of the superior court is directed to prepare an amended minute order of the November 13, 2017 sentencing hearing and the abstract of judgment to reflect the correct presentence custody credits. The clerk of the superior court is also directed to prepare an amended abstract of judgment to reflect the section 12022.5 firearm enhancement and the possession of a firearm by a felon conviction and delete the incorrect information (the section 12022.53 enhancement and the “POSS/MANU/SELL DNGRS WPN” conviction). Finally, the superior court clerk is directed to forward certified copies of the corrected abstract of the judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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CODRINGTON
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.